LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court
FILED
JAN 15 1970
JOHN F. DAVIS, CLERK

No. 377

In the Supreme Court of the United States

OCTOBER TERM, 1969

TAMPA PHOSPHATE RAILROAD COMPANY, PETITIONER

v.

SEABOARD COAST LINE RAILROAD COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION AS AMICI CURIAE

ERWIN N. GRISWOLD,
Solicitor General,
RICHARD W. McLAREN,
Assistant Attorney General,
HOWARD E. SHAPIRO,
W. RICHARD HADDAD,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

ROBERT W. GINNANE,
General Counsel,
JEROME NELSON,
Attorney,
Interstate Commerce Commission,
Washington, D.C. 20423.

INDEX

	Page
Statement	2
Discussion	6
Conclusions	10

CITATIONS

Cases:

City of Chicago v. *United States*, Nos. 101 and 102, this Term, decided December 9, 1969 7

Long Island R. Co. v. *New York Central R. Co.*, 281 F. 2d 379 8

Nelson, Inc., v. *United States*, 355 U.S. 554 8

Piedmont & Northern Ry. Co. v. *United States*, 280 U.S. 469 7

Porter v. *Lee*, 328 U.S. 246 9

Powell v. *United States*, 300 U.S. 276 8

Riss & Co. v. *United States*, 117 F. Supp. 296, affirmed *per curiam*, 346 U.S. 890 8

Rochester Telephone Corp. v. *United States*, 307 U.S. 125 ..... 5, 6

Texas & Pacific Ry Co. v. *Gulf, Colorado & S.F. Ry. Co.*, 270 U.S. 266 9

United States v. *Interstate Commerce Commission*, 337 U.S. 426 8

United States v. *Maher*, 307 U.S. 148 7

United States v. *Southern Ry. Co.*, 364 F. 2d 86, certiorari denied, 386 U.S. 1031 8

United States v. *Southern Ry. Co.*, 380 F. 2d 49 8

Western Pac. Cal. R. Co. v. *Southern Pacific Co.*, 284 U.S. 47 9

Statutes and rule:

Interstate Commerce Act, Section 1(18), 49 U.S.C. 1(18), *et seq* 1, 2, 4, 5, 6, 7, 8, 9

Section 1(20) 1, 2, 4, 5, 6, 7, 8, 9

Section 1(22) 3, 4, 5

Urgent Deficiencies Act, 28 U.S.C. 1336, 2321–2325 ..... 6, 7, 9, 10

28 U.S.C. 2283 ..... 2, 5, 6, 9

Rules of Supreme Court of the United States, Rule 42(4) 2

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 877

TAMPA PHOSPHATE RAILROAD COMPANY, PETITIONER

v.

SEABOARD COAST LINE RAILROAD COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION AS AMICI CURIAE

The decision of the court of appeals in this private litigation deals—we believe correctly—with the procedures for review of a determination by the Interstate Commerce Commission that it has jurisdiction to deny permission for proposed rail construction, and with the effect that such a determination has in collateral litigation. The court held that the Commission's determination that a proposed rail line is in interstate commerce and not exempted under the Interstate Commerce Act may be attacked only on direct review by a three-judge court and not by way of defense to a suit under Section 1(20) of the Act for an injunc-

372-940—69

tion against unauthorized rail construction; it further held that an injunction issued under Section 1(20) against state condemnation proceedings initiated as a step in railroad construction comes within the exception to the anti-injunction statute, 28 U.S.C. 2283, for injunctions "expressly authorized by Act of Congress * * *" and is not barred by more general principles of comity.

Following the oral argument below, the court of appeals requested the United States and the Interstate Commerce Commission to file a brief expressing their views on these questions and they did so. The court's opinion substantially adopted the views expressed in the government's brief. Accordingly, we consider it appropriate to file this memorandum, pursuant to Rule 42(4), to express the support of the United States and the Interstate Commerce Commission for the decision below.

STATEMENT

On July 1, 1965, the Tampa Phosphate Railroad Company (Tam-Phos), a corporation which proposed to build a railroad, filed an application with the Interstate Commerce Commission pursuant to Section 1(18) of the Interstate Commerce Act, 49 U.S.C. 1 (18),[1] for a certificate of convenience and necessity permitting it to construct a 30-mile railroad line from a point in Polk County, Florida, to Port Sutton, Florida, on Tampa Bay, for the transportation of

[1] The pertinent statutory provisions are set forth in the petition (Pet. 9–13).

phosphate rock and phosphate products (Pet. App. 45–46).[2] In the alternative Tam-Phos asked the Commission to dismiss its application on the grounds that the line would be operated exclusively in *intra*state commerce (and thus beyond the jurisdiction of the Commission) and that it would constitute a spur or industrial track wholly within one state (and thus be exempt from the certificate requirement under Section 1(22)) (Pet. App. 51–52).

After oral hearings, the Commission's examiner held that Tam-Phos' proposed line would be in *inter*state commerce and would not be an exempt spur or industrial track (Pet. App. 116–121). He further found that the proposed line was not required by the public convenience and necessity (Pet. App. 128, 130). In an order served August 7, 1967, the Commission adopted the examiner's recommendations and denied the Tam-Phos application (Pet. App. 147).[3] Tam-Phos did not seek judicial review of the Commission's decision (Pet. App. 157).

While the matter was still before the Commission, Tam-Phos began condemnation proceedings in the Florida state courts seeking easements under state law for construction of the proposed line over existing tracks of the Seaboard Coast Line Railroad Company

[2] "Pet. App." refers to the separately bound Appendix to the petition.

[3] A similar proposal of the Seaboard Coast Line Railroad also before the Commission was dismissed as moot, because the Supreme Court of Florida had invalidated the bond issue necessary for construction of the port terminus Seaboard proposed to use (Pet. App. 148).

(Seaboard). In these state actions, Seaboard moved for dismissal on the grounds, *inter alia,* that the proposed line did not have the necessary Commission certificate. In one of the condemnation suits, the state court, apparently reserving its ruling on Seaboard's motion to dismiss, scheduled the matter for trial on December 18, 1967 (Pet. App. 7, 155).

In November 1967, Seaboard filed an action in the United States District Court for the Middle District of Florida, pursuant to Section 1(20) of the Interstate Commerce Act, seeking to enjoin Tam-Phos from continuing the condemnation proceedings and from constructing or operating any railroad facilities without the certificate required under Section 1(18). On December 14, 1967, the district court denied Tam-Phos' motion to dismiss and granted a preliminary injunction against further prosecution of the condemnation suits. In so doing, the court held, *inter alia,* that Seaboard was a "party in interest" entitled to sue under Section 1(20) and that the proposed line would not be a spur or industrial track within the Section 1(22) exemption. However, it reserved judgment on Tam-Phos' further defense that the proposed line was not within the Commission's jurisdiction. Although this contention had already been considered and rejected by the Commission, the district court indicated its intention to reexamine it *de novo* (Pet. App. 156–163).

On Tam-Phos' appeal from the preliminary injunction, the court of appeals sustained the jurisdiction of the district court to enjoin further prosecution of the state condemnation suits (Pet. App. 3–40). It

held that the anti-injunction statute, 28 U.S.C. 2283, was no bar to an injunction under Section 1(20), since such an injunction is "expressly authorized by Act of Congress"[4] (Pet. App. 9–15). It also held that because the state condemnation suit involved a subject matter different from the federal action, and was not an exercise of concurrent jurisdiction, the injunction was not barred by any principle of comity between federal and state courts (Pet. App. 15–19).

Because the district court had indicated its intention to try *de novo* the interstate commerce question already ruled on by the Commission, the court of appeals went on to consider, in the interests of judicial economy, the appropriateness of this course. It held that Tam-Phos could have obtained review of the Commission's ruling in a three-judge district court; any authority to the contrary had been overruled when the negative order doctrine was abolished by *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125. Since the issues of interstate commerce for purposes of Section 1(18) and of whether the proposed construction involves a spur or industrial track exempt under Section 1(22) are committed to the Commission's primary jurisdiction subject to exclusive review in three-judge court, the court held that the principle of collateral estoppel bars relitigation of these questions before a single judge in an enforce-

[4] 28 U.S.C. 2283 provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court *except as expressly authorized by Act of Congress*, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments. [Emphasis added.]

ment action under Section 1(20). It further held that collateral estoppel could be avoided only if Tam-Phos could prove that its proposal had been modified to such an extent as to present a new situation not passed on by the Commission (Pet. App. 30–34). Judge Brown, concurring, joined the court's opinion but stated that in his view, any change in circumstances was required by Section 1(18) to be initially considered by the Commission (Pet. App. 34–40).

DISCUSSION

We believe that the court of appeals gave the proper effect to the Interstate Commerce Commission's determination that the proposed rail construction is subject to the Commission's jurisdiction and should not be authorized. The result accords with modern concepts of judicial review, with the intent of Congress to provide a clear and orderly procedure for review of Commission determinations, and with the standards of comity between state and federal courts defined in 28 U.S.C. 2283. Petitioner's attack upon the sound principles followed by the court of appeals has no merit, and it presents no question warranting further review.

1. The Commission's decision denying petitioner a certificate of public convenience and necessity for new construction under Section 1(18), 49 U.S.C. 1(18), is reviewable in a three-judge district court under the Urgent Deficiencies Act (28 U.S.C. 1336, 2321–2325). This is clearly established by the decisions of this Court overruling the "negative order doctrine". *Rochester Telephone Corp.* v. *United States,* 307 U.S.

125;[5] *United States* v. *Maher,* 307 U.S. 148. Thus petitioners had—and since the Urgent Deficiencies Act contains no statute of limitations, still have—a remedy before a three-judge district court to review the Commission's determinations as to both jurisdiction and the merits.

2. Petitioners' right to review lies exclusively before a three-judge district court; the Commission's determination may not be collaterally attacked in defense of a suit under § 1(20). This follows necessarily from the statutory scheme. First, since actions under Section 1(20) may be brought in "any court of competent jurisdiction" either federal or state, the result of allowing them to serve as a vehicle for review would be that not only single-judge district courts but also state judicial systems would be reviewing Commission actions; this would plainly be inconsistent with the careful scheme of the Urgent Deficiencies Act, with its provision for review of Commission determinations by three-judge federal district courts and direct appeal to this Court. Moreover, since a protesting party could obviously not challenge the Commission's grant of a certificate by a suit under § 1(20), the result of allowing such a review to a disappointed applicant would be to make available forums for review vary according to the affirmative or negative nature of a Commission ruling; this would be both unreasonable and unfair. Cf. *City of Chicago* v. *United States,* Nos. 101 and 102, this

[5] In *Rochester*, the Court specifically overruled *Piedmont & Northern Ry. Co.* v. *United States*, 280 U.S. 469, which had held a denial of a certificate for new construction under § 1(18) unreviewable.

Term, decided December 9, 1969; *United States* v. *Interstate Commerce Commission,* 337 U.S. 426, 443.

The rule against collateral review of Commission orders has been recognized in numerous decisions, *e.g. Nelson, Inc.* v. *United States,* 355 U.S. 554, 562; *Riss & Co.* v. *United States,* 117 F. Supp. 296, 301 (W.D. Mo.), affirmed *per curiam,* 346 U.S. 890; *United States* v. *Southern Ry Co.,* 380 F. 2d 49, 53–55 (C.A. 4); *United States* v. *Southern Ry. Co.,* 364 F. 2d 86, 91–93 (C.A. 5) certiorari denied, 386 U.S. 1031. To the extent that *Powell* v. *United States,* 300 U.S. 276, may be read as holding a Commission order denying a certificate reviewable in a proceeding under Section 1(20)—*i.e.,* where despite Commission denial, the applicant proceeded with construction—its authority was, as the court of appeals explained (Pet. App. 23–25), overruled when the negative order doctrine was abolished. In any event, neither *Powell,* nor *Long Island R. Co.* v. *New York Central R. Co.,* 281 F. 2d 379 (C.A. 2), which followed it, directly involved a Commission ruling on an application under Section 1(18). The issue in both cases concerned Commission approval of certain tariffs with subsidiary comments as to whether a certificate was required under Section 1(18). Neither case squarely holds that a Commission determination under Section 1(18) may be collaterally challenged in a suit under Section 1(20).

3. The court below correctly held that Tam-Phos could not evade the Commission's ruling that its proposal requires certification under Section 1(18) by starting condemnation suits in the state courts in-

stead of seeking review of the Commission's order under the Urgent Deficiencies Act. As the court of appeals found, the condemnation suits represented crucial initial steps in the very construction which the Commission had declined to authorize. As such they were enjoinable under Section 1(20) at the suit of the United States, the Commission, affected state regulatory bodies, or "any party in interest." This suit was therefore properly filed before a single judge federal district court by Seaboard, a competing carrier with standing to vindicate the public interest expressed in Sections 1(18) and 1(20) against improvident expansion of the nation's rail plant. See *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & S. F. Ry. Co.*, 270 U.S. 266; *Western Pac. Cal. R. Co.* v. *Southern Pacific Co.*, 284 U.S. 47, 50–51. The condemnation suits were not insulated from the jurisdiction of the federal court by the anti-injunction statute, 28 U.S.C. 2283, because that court's writ squarely falls within the exception for injunctions "authorized by Act of Congress." Nor were the condemnation actions insulated on general grounds of comity. The subject matter of the condemnation suits and the Section 1(20) suit were entirely different; even though Seaboard raised "interstate commerce" as a defense in the state court, that defense did not convert the suits into Section 1(20) actions. Cf. *Porter* v. *Lee*, 328 U.S. 246.

4. The history of the case illustrates the kind of purposeless legal tangle which could result from any course other than the simple and forthright procedure set forth in the decision below. Three forums—the

Commission, the state condemnation courts, and the federal district court—were presented with claims that the proposed construction was not in interstate commerce. Although that issue had already been litigated and decided in the Commission, the state court and subsequently the single-judge federal court were prepared to litigate it again. The resulting delay and confusion could have been avoided if Tam-Phos, which initially had invoked the Commission's jurisdiction, had sought review of its determinations in an orderly manner under the Urgent Deficiencies Act.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
RICHARD W. MCLAREN,
Assistant Attorney General.
HOWARD E. SHAPIRO,
W. RICHARD HADDAD,
Attorneys.

ROBERT W. GINNANE,
General Counsel,
JEROME NELSON,
Attorney,
Interstate Commerce Commission.

JANUARY 1970.

U.S. GOVERNMENT PRINTING OFFICE: 1970